

# United States Court of Appeals

For the Ninth Circuit

CALDWELL FINANCE CO.,

*Appellant*

vs.

SAMUEL A. McALLISTER, Trustee in Bank-  
ruptcy of the Estate of OSCAR HERMAN  
HERREID, Bankrupt.

*Appellee*

Appeal from the United States District Court for  
the District of Oregon

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## APPELLANT'S REPLY BRIEF

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No. 14453

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**APPELLANT'S REPLY BRIEF**

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**Argument in Reply**

Appellee relies on Section 70 C of the bank-  
ruptcy act. So does appellant.

Section 70 C of the bankruptcy act only provides that *if a creditor of the bankrupt could have obtained a lien by legal or equitable proceeding at the date of bankruptcy then the trustee has the rights of such a creditor.* (P. 5 Appellant's Brief.

In Oregon, no creditor of the bankrupt could have secured a lien on the property by any proceedings legal or equitable because title was never in the bankrupt, nor was it ever intended to be in the bankrupt.

Title was always in Caldwell and never in the bankrupt. How could an attaching creditor attach property to which the bankrupt did not have title

Counsel does not deny that the *intention of the parties* as to whether a transaction is a conditional sale or a chattel mortgage is the determining factor in Oregon.

If Oregon followed the California and Washington rule that a conditional sale is to be construed as a mortgage and must be recorded, there might

be a more serious question, but there can be no question but what the parties knew what they were signing in this case. They had just satisfied a chattel mortgage and deliberately chosen the conditional sale form. Under those circumstances how could it be said they intended to create a chattel mortgage? Such a circumstance or anything even remotely resembling the same was not present in any case cited by the appellee.

The rule cited by counsel on page 14 of his brief is not applicable for it applies to transfers within four months of bankruptcy.

Cases cited by counsel —

*A. G. Spaulding Bros. v. Browne*, 36 Ore. 160 repeats the Oregon rule that the intention of the parties is the determining factor.

*Bell v. Hanover Fire Ins. Co.*, 107 Ore. 513—is not factually applicable as it applies to a real estate conveyance intended as a mortgage.

*Larison Frees & Co. v. Payne*, 163 Ore. 276, 96 P 2d 106.7. We do not quarrel with the holding but it has no relation to the question of "intention of the parties to transfer title."

*Hughbanks v. Gourley*, 12 Wash. 2nd 44 is not applicable because the rule in Washington as in California is that a conditional sale is treated as a chattel mortgage and must be recorded. See 92 ALR 313.

In Oregon the rule is to the contrary and depends on the intention of the parties as stated in *Kliks v. Courtemanch*, 150 Ore. 332 which case is relied upon by both parties.

That both instruments (chattel mortgages and conditional sales) can be construed as security devices can not be questioned and this is why the rule in Oregon is made to depend on the intention of the parties.

In *First National Bank v. McCreary*, 66 Ore. 484, 132 Pac. 718 at page 492 it was said:



“A valid mortgage is a conditional sale.”

## CONCLUSION

The cases cited by counsel have each been discussed and are not applicable to the facts in question, or do not state the Oregon rule.

The rule in Oregon is dependent on the intentions of the parties and the intention of the parties is clear when the same parties previously had cancelled a chattel mortgage on another piece of equipment and deliberately chose a conditional sale contract delivering bills of sale and certificates of title to the conditional vendor.

The mandate of the Oregon statutory presumption set forth on page 10 of appellant's brief is inescapable.

There would be no equity in permitting the general creditors a windfall when the money of Caldwell was secured long before the bankruptcy petition. There is no preference involved. The net

result will be a substantial loss to Caldwell in any event.

Appellee's brief discloses no cases modifying or qualifying the Oregon rule of intention. The facts are admitted and clear and the result is inescapable. Under the circumstances, the cause should be reversed with instructions to the Trustee to deliver the proceeds of the sale to the satisfaction of Caldwell's security claim and that as to the balance of said claim Caldwell be deemed to be a general creditor.

Respectfully submitted,

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